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No. 07-842

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SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

ABN AMRO VERZEKERINGEN BV,

Petitioner,

v.

GEOLOGISTICS AMERICAS, INC., *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENT GEOLOGISTICS AMERICAS, INC.

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QUESTION PRESENTED

Whether Petitioner has presented compelling reasons to grant its Petition, where Petitioner has failed to offer any arguments or case law to contradict the holding of the Second Circuit Court of Appeals that a course of dealings existed governing the contract between the parties, in which clear terms and conditions applied, which provided that a freight forwarder could limit its liability for services provided unless the shipper declared value, where shipper had never declared value on any of the previous shipments and obtained insurance coverage for the subject shipment which would obviate the need to declare value.

CORPORATE DISCLOSURE STATEMENT PURSUANT TO SUPREME COURT RULE 29.6

Respondent, Geologistics Americas, Inc. is now known as Agility Logistics Corp. Agility Logistics Corp. is a publicly traded company; it has no parent corporation and no publicly held company owns 10% or more of its stock.

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INTRODUCTION

Petitioner has presented no "compelling reasons" for their petition for Writ of *Certiorari* ("Petition") to be granted, as required by Rule 10 of the Rules of the Supreme Court of the United States. Petitioner failed to demonstrate that the Second Circuit's opinion, issued for this matter, case no. 05-1917-cv, ("Opinion") is in conflict with a decision of this Court or of another Court of Appeals or that the Second Circuit decided an important federal question that had not been previously determined by this Court, as required by Rule 10. Petitioner merely presents unsubstantiated accusations that the Opinion will adversely affect future actions because a carrier was allowed to limit its liability. Petitioner fails to set forth any of the requisite grounds that would even serve as a basis for review. Therefore, the Petition should be denied.

In a entirely conclusory manner, Petitioner asserts that the subject Opinion "is the first case in the history of the United States wherein an illegal unlicensed trucker has been permitted to limit its liability." Strangely enough, this is the only basis for Petitioner's request for review by this Court. Petitioner's emotional plea notwithstanding, it is clear that a record was considered (as evaluated in the Opinion) wherein a prior course of dealings existed between the parties such that a limitation of liability was applicable. The Opinion presents no conflict whatsoever with any other Circuit Court ruling or an important (and/or unanswered) federal question not previously resolved by this Court. Petitioner has completely failed to carry their burden of demonstrating that there is any compelling reason for the Court to grant their petition. Accordingly the petition should be denied.

STATEMENT OF THE CASE

Petitioner misstates the facts and the issues of the underlying case. At all times material, GeoLogistics was an international freight forwarding company. GeoLogistics arranged for the transportation by air of the subject printing machine from Europe to JFK Airport in New York. The JFK office of GeoLogistics arranged to clear the machine through customs. GeoLogistics arranged for local trucking of the printing machine from JFK Airport to Huntington Station, New York.

At all times material, Art Messenger Delivery Service was a reputable trucking company that had previously handled thousands of cargo movements for GeoLogistics. In the case below, the record included affidavits from GeoLogistics personnel concerning the manner in which Art Messenger was selected. GeoLogistics had previously determined that Art Messenger had standard insurance coverage typical for truckers. Art Messenger had handled thousands of trucking transactions dating back to 1995 for customers of GeoLogistics. Further, Art Messenger was licensed for interstate trucking by the Interstate Commerce Commission. The Second Circuit considered a record whereby, as a matter of technical non-compliance, Art Messenger did not have a current license for intrastate trucking for transports solely within the state of New York. Nevertheless, GeoLogistics established that Art Messenger had handled thousands of transactions for GeoLogistics customers prior to the subject shipment without a single complaint.

Petitioner argues that neither Respondent nor Art Messenger issued any bill of lading, contract of carriage or other transport document for this shipment. GeoLogistics made for arrangements for local transportation after the cargo cleared customs. Plaintiff has not, and indeed cannot, identify any requirements such that GeoLogistics, or for that matter Art Messenger, was required to issue a bill of lading, contract of carriage or other transport document for the shipment. In fact, the record below illustrated that GeoLogistics did not consolidate this cargo. To the extent the cargo was damaged, the cargo was never in the care, custody and control of Geologistics. In this regard, the only potential issue for debate concerned whether or not GeoLogistics was negligent with regard to its selection of Art Messenger. Respondent was never a carrier in any sense. The Second Circuit recognized that the lower Court ruling correctly focused upon GeoLogistics as a "non-carrier freight forwarder" which merely arranged for trucking. Thus, Respondent, as a freight forwarder rather than a carrier, would not normally be liable to the shipper for damages sustained during carriage unless its selection of a carrier was negligent.

Petitioner severely misconstrues the issues that were before the Second Circuit. The central issue on appeal focused upon whether or not GeoLogistics, as an *arranging* freight forwarder could limit its liability for negligent selection. Petitioner presents GeoLogistics as a *carrier* rather than an *arranging* freight forwarder. The distinction has been firmly established in the Second Circuit. *See Prima U.S., Inc. v. Panalpina, Inc.*, 223 F.3d 126 (2d Cir. 2000). The *Prima* Court analogized an arranging freight forwarder as a "travel agent."

Id. at 129. There is no dispute that GeoLogistics merely made arrangements for transportation via its selection of Art Messenger, rather than acting as a carrier of cargo.

Undaunted, Petitioner misstates the relationship between the parties at hand. Petitioner agrees that its subrogor, Halm Industries ("Halm"), entered into the agreement for GeoLogistics to arrange for the pick up of the cargo. Halm never declared value to GeoLogistics for forwarding or trucking services. The Opinion acknowledged admissions which were established by record that Halm had sought to protect itself by obtaining first-party insurance coverage via ABN Amro. There would be no need to declare a value and pay higher rates for services if a shipper chooses to procure insurance for the shipment. Petitioner's claims that it had no opportunity to declare value is unsupported.

Petitioner conveniently omits the dispositive fact that Geologistics and Halm had been doing business with each other since 1997 (three (3) years prior to the subject shipment). During that time period GeoLogistics had engaged in twenty-five (25) prior transactions on behalf of Halm. Following each transaction, an invoice was generated by GeoLogistics and submitted to Halm. Each invoice contained terms and conditions of service on the reverse side that were identical to those used in this case. The Opinion focused upon the twenty-five (25) prior transactions which were governed by the limitation of liability contained in these terms and conditions. Halm did not request, nor did it pay special compensation to increase GeoLogistics' liability limitation in excess of $50.00 per shipment. Halm candidly admitted that it

utilized cargo insurance to protect itself against loss, rather than declaring value with GeoLogistics or other transportation providers. Halm admitted that it was compensated for the damage for the subject cargo through its insurers.

In its Statement of the Case, Petitioner claims: "Six days after the damage to the machine in question, GeoLogistics issued its only document to Halm, to-wit a sales invoice. That document provided *inter alia* that GeoLogistics assumed no liability as a carrier and that it was authorized to select a trucker which was to be considered the "Agent" of Halm and that the goods may be "entrusted to such carrier subject to all conditions as to limitation of liability for loss or damage appearing in the bills of lading, receipts or tariffs issued by such carrier." However, the issue is not the subject invoice alone, but the critical prior dealings that formed the contractual relationship which was thoroughly evaluated by the Second Circuit.

Finally, Petitioner maintains that the trucker's failure to maintain a valid license or permit to perform transportation intrastate somehow invalidates an otherwise legal and enforceable contract. However, Petitioner provides no basis for this assertion. In fact this assertion is in direct contravention to case law decided on this very issue. Petitioner's position is therefore entirely untenable.

REASONS FOR DENYING THE PETITION

I. A Course Of Dealings Existed Between The Parties Such That The Terms And Conditions On The Reverse Side Of The Issued Invoices Governed The Agreement For Services Provided In This Matter.

It is well-established that the utilization of invoices containing terms and conditions of service may constitute a course of dealings. *See Calvin Klein Limited v. Trylon Trucking Corp.*, 892 F.2d 191, 195 (2d Cir. 1989); *Capital Converting Equipment, Inc. v. LEP Transport, Inc.*, 965 F.2d 391 (7th Cir. 1992); *General Electric Co. v. Harper Robinson & Co.* 818 F. Supp. 31 (E.D.N.Y. 1993); *Government of the United Kingdom of Great Britain and Northern Ireland v. Northstar Services, Ltd. and Palapina, Inc.* 1 F. Supp. 2d 521 (D. Md. 1998). Petitioner points to no conflict amongst the Circuits on this issue.

Terms and conditions contained on the reverse side of the invoice utilized on past dealings that provide the availability or option to increase the level of liability constitute a contractual agreement as to the terms provided. Petitioner's failure to acknowledge the prior course of dealings misrepresents the factual record.

Petitioner argues that GeoLogistics entrusted (without authorization) the shipment to Art Messenger, "an unlicensed, household effects mover that was manifestly incapable of transporting heavy machinery." There is no record support for the reference that Art Messenger was merely a mover of household effects. Quite the contrary, GeoLogistics had successfully used Art Messenger on thousands of cargo shipments without any claims.

II. An Arranging Freight Forwarder May Limit Its Liability Through The Use Of Terms And Conditions Via A Prior Course Of Dealings[1].

There were twenty-five (25) prior transactions between Halm and GeoLogistics. Halm agreed that it did not seek to declare value to either GeoLogistics or the carrier. Yet, Petitioner argues that it was not provided a "fair opportunity" to declare value for carriage. It is simple and obvious; Halm Industries admitted that it did not seek to declare value because it looked to first party insurance coverage to protect itself. As the Opinion correctly held, GeoLogistics' terms and conditions did set forth that the company could be liable for the full value of goods if the customer had declared value and agreed to pay for higher charges. Respondent could have been liable for damages in excess of $50.00 while the cargo was in the possession of the carrier on a theory of negligent selection if the shipper declared value and had agreed to pay higher charges for services.

Petitioner presents Art Messenger's licensing issue as an "illegal transaction". GeoLogistics, as a matter of factual issue, could conceivably have negligently selected Art Messenger. The standard of care for an arranging freight forwarder's negligent selection implicates the potential liability for its own activities (selection, supervision and documentary errors) rather than an imputation of pure carrier liability. Petitioner boldly proclaims in its conclusion that "this is the first case in the history of the United States

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1. Points one (1) and two (2) of the petition for writ of certiorari are only directed to Art Messenger and as such no response was submitted on behalf of GeoLogistics as to the issue that implicates Art Messenger alone.

wherein an illegal, unlicensed trucker has been permitted to limit its liability. . . ." This is a patently false presentation of the issue. Rather, the issue as to Respondent involves negligent selection and Respondent's own limitation of liability for its services rendered that included retention of the trucker.

Notwithstanding the rhetoric of Petitioner, it is clear, as the trial Court in this case found, that, under New York law, a freight forwarder may limit its liability for negligent selection via the use of the terms and conditions of service wherein a limitation of liability was utilized. *ABN AMRO Verzekeringen BV v. Geologistics America, Inc.*, 253 F. Supp. 2d 757, 767 (S.D.N.Y. 2003) (citing *Sommer v. Fed. Signal Corp.*, 79 N.Y.2d 540 (1992)). ABN Amro's subrogor, Halm, never chose to declare value to either GeoLogistics or to the trucker. GeoLogistics, under the terms and conditions of service, was delegated with the responsibility to select a trucker. GeoLogistics agreed to a limitation of liability for Art Messenger because it never received any instructions from Halm to declare value with the trucker. GeoLogistics' terms and conditions authorized the selection of third parties. Likewise, GeoLogistics' terms and conditions of service set forth a $50.00 limitation of liability that would apply to a negligent selection claim absent a declaration by the shipper for full value or an agreement to pay higher charges.

In none of the previous 25 transactions with Geologistics did Halm choose to declare value. In every one of these transactions, Halm accepted the terms and conditions of service which provided that Geologistics would select the third-party carrier, and that its liability for the selection of the carrier would be limited. The prior course

of dealings therefore mandates that the terms and conditions of the previously issued invoices governed the contract between the parties, which provides for Geologistics to limit its liability in the manner described herein.

III. Geologistics' Limitation Of Liability Is Enforceable Even If Art Messenger Was Not Properly Licensed.

Petitioner argues that Art Messenger was an illegal entity and thus, GeoLogistics' limitation of liability is invalid. Petitioner claims that Art Messenger was not properly licensed to carry this cargo. This theory is a "red herring" because there can be no nexus between any alleged ministerial and technical noncompliance and any of the damages alleged.

There was no evidence presented that illustrated that any technical noncompliance on the part of Art Messenger contributed in any way to the subject loss. The argument that Art Messenger's failure to properly maintain a permit for intrastate trucking renders the Geologistics contract unenforceable for "illegality" must be rejected out of hand. The remedy for Art Messenger's failure to maintain its intrastate permit resides solely with state regulatory authorities, who may penalize Art Messenger by assessing fines. *See Land Ocean Logistics, Inc. v. Aqua Gulf Corp.*, 68 F. Supp. 2d 263, 270 (W.D.N.Y. 1999) ("[A] court should not affix the additional sanction of rendering a private contract void. . . ."); *see also Concord Indus., Inc., v. K.T.I. Holdings, Inc.*, 711 F. Supp. 728, 729 (E.D.N.Y. 1989).

In any event, Art Messenger was hardly an unregistered carrier; it was properly permitted to perform interstate trucking and operate in four states. As the lower Court explicitly notes, there is also no evidence in the record to suggest that Art Messenger poorly maintained its trucks or hired reckless, unqualified drivers, much less any evidence that Geologistics failed to use reasonable care—or was reckless—in not noticing any such defects. *ABN AMRO Verzekeringen BV*, 253 F. Supp. 2d at 767.

In *Land Ocean Logistics, Inc.*, the Court addressed a nearly identical fact pattern. The Defendants in *Land Ocean* moved for summary judgment on the basis that the transportation contract was illegal and therefore its terms unenforceable because the transportation broker was not properly licensed by the Interstate Commerce Commission. The Court denied the motion, however, holding specifically that the fact that a transportation broker had failed to obtain the proper licensing in violation of the ICC act did not render the agreement unenforceable. *Id.* at 270. The Court reasoned that "[w]here a congressional statute provides specific penalties for violations, a court should not affix the additional sanction of rendering a private contract void unless the legislative history evinces such an intent; it is inappropriate to add judicially to the remedies provided in the statute." *Id.* (citing *Concord Industries, Inc.*, 711 F. Supp. at 729 (additional citations omitted)).

Additionally, the Court in *Land Ocean* focused on the pertinent fact that there was nothing intrinsically illegal about the contract itself; rather, that any violation of applicable law was only technical in nature. Finally,

the Court pointed out that the parties could have included a clause in their contract which provided that proper licensing and permitting were conditions precedent to the enforceability of the contract. *Id.* at 272.

In the instant case, the contract between Halm and Geologistics did not contain any such language. In fact, the contract, specifically in paragraph 2 of the terms and conditions, squarely assigned a principal/agency relationship between the underlying carrier and Halm.

Concord Industries is instructive as to the proper analysis of the consequences of a transportation company's technical failure to obtain proper licensing in compliance with applicable statutory regulations. The Court in *Concord Industries* held that such a technical failure would not operate to invalidate an otherwise enforceable private contract. *Concord Industries, Inc.*, 711 F. Supp. at 729-30. In that case, the carrier was transporting fuel, and failed to obtain the proper permits required under the ICC as either a carrier or a broker. Despite the inherently dangerous nature of the transportation of fuel, the Court held that the mere fact that the carrier did not obtain proper licenses or permits to move such cargo did not invalidate a contract which itself had no underlying illegal purpose. *Id. See also ETS-Hokin & Galvan, Inc. v. Maas Transport, Inc.*, 380 F.2d 258 (8th Cir. 1967).

The *Concord* court notably pointed out that while the "Plaintiff may be susceptible to the imposition of penalties by the ICC, . . . this Court will not affix the additional penalty of voiding a private contract freely entered into by both parties." *Id.* at 730.

In the instant case, there was no allegation and certainly no record or otherwise admissible evidence submitted by the Petitioner which would support a causal nexus between the damages allegedly incurred, and Art Messenger's technical failure to comply with licensing and registration requirements. Therefore, the instant case is indistinguishable from the *Concord* and *Land Ocean* decisions cited above, and Petitioner's attempt to invalidate the liability-limiting provisions of an otherwise legal, enforceable and undisputed contract must fail as a matter of law.

Petitioners have not established any compelling reasons for this Court to grant their petition. Therefore, Respondent respectfully requests that the petition be denied.

CONCLUSION

The Opinion issued by the Second Circuit construed an unrefuted prior course of dealings wherein Halm and GeoLogistics utilized terms and conditions of service. As a matter of law, the terms and conditions of service created a contract between Halm and GeoLogistics. Halm never declared value, although it clearly had the option to do so. In addition, Halm never instructed GeoLogistics to declare value with trucker.

Whether or not Art Messenger's licensing constituted an issue of negligent selection is irrelevant to the analysis. At most, GeoLogistics could conceivably confront an issue for negligent selection of the carrier. However, as the Opinion makes clear, any such liability for negligent selection is limited by the terms and conditions that formed the contract agreed to by the parties.

The technical non-compliance as to licensing is not an issue of first impression as Petitioner declares. The presentation of the licensing issue is, indeed, a false and irrelevant question for this Court, and therefore the Petition must be denied.

Respectfully Submitted,

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